CC: TO JUDGE PM

Honorable Robert S Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNIFER ERICKSON,

Plaintiff,

v

BARTELL DRUG COMPANY,

Defendant

Civil No C00-1213L

DEFENDANT'S REPLY ON CROSS-MOTION FOR SUMMARY JUDGMENT

Oral Argument: Wednesday, May 30, 2001 at 1:30 p.m.

I. INTRODUCTION

Summary judgment on both plaintiff's claims is appropriate because plaintiff fails to demonstrate either disparate treatment or disparate impact in violation of the Pregnancy Discrimination Act ("PDA") or Title VII

There are several inconsistencies in plaintiff's current position As plaintiff has contended since Fall 2000, and as she stated in her opening memorandum at page 6, "in this case there are no material facts in dispute " After receiving defendant's cross-motion, plaintiff now (inconsistently) suggests there are material facts in dispute on the second claim alleging disparate impact. Defendant contends plaintiff's initial statement of "no material facts in dispute" is correct for both claims

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET SEATTLE WASHINGTON 98101 2352

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Plaintiff also suggests her deposition testimony cannot be relied upon by defendant in its motion. But a defendant is entitled to rely upon a plaintiff's deposition testimony in its motion for summary judgment. Foster v. Arcata Associates, 772 F 2d 1453, 1462 (9th Cir 1985)

Another inconsistency regarding plaintiff is her separate motion to strike from consideration Exhibit 18 to her deposition (describing reasons why many employers do not cover prescription contraceptives). Defendant has asked plaintiff to withdraw her motion to strike because Exhibit 18 is merely a quote from page 8 of Exhibit B to Dr. Easterling's declaration (Exhibit 1 to plaintiff's opposition to Bartell's cross-motion), the article on contraception by William M Mercer

To accept plaintiff's interpretation of the PDA would be to expand the coverage of the PDA to make it apply to every medical condition related to female reproduction if the state of not being pregnant is related to pregnancy, so are such things as infertility, etc Under plaintiff's interpretation, whenever an employer provides any type of preventive health care at all (e.g , "routine well baby care," Dep Ex. 10), it must cover every condition related to female reproduction because each is potentially related to a woman being pregnant at some point during her life. Such an expansive result could not have been intended by Congress The statutory language and legislative history make clear that the PDA does not encompass pre-pregnancy medical conditions or the state of not being pregnant.

Plaintiff's reliance on International Union, UAW v Johnson Controls, Inc., 499 U.S. 187, 111 S. Ct 1196, 113 L. Ed. 2d 158 (1991), does not alter that conclusion. Johnson Controls concerned a job policy that explicitly differentiated between women employees and men employees, treating all women employees as "potentially pregnant" and at risk from lead exposure, but ignoring the fact that all men were potentially fathers and also at risk from lead exposure. It was not concerned with (a) fringe benefits or (b) the state of nonpregnancy, but only with the hurdle to employment created by the policy.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622 8484
4400 TWO UNION SQUARE
601 UNION STREET SEATTLE WASHINGTON 98101 2352

Even assuming that nonpregnancy is a medical condition related to pregnancy and child birth, then there is still no discrimination because Bartell's health care plans provide the same coverage for all family planning or preconception conditions to all employees and their dependents. Newport News Shipbuilding & Dry Dock Co v EEOC, 462 U.S. 669, 685, 103 S Ct. 2622, 77 L. Ed 2d 89, 103 (1983), deals with fringe benefits, rather than a job hurdle, holding that, under the PDA, an employer must treat spouses of male employees the same as female employees with regard to pregnancy benefits, which is precisely what Bartell's plan does

II. STATEMENT OF UNDISPUTED FACTS

A. Plaintiff's testimony constitutes "undisputed facts" for this motion.

Plaintiff stated in her initial brief that there were "no material facts in dispute " In Bartell's original cross-motion, the facts recited were solely from plaintiff's own deposition testimony and therefore (for the purposes of this motion) are undisputed Plaintiff's suggestion the Court cannot rely on her sworn testimony should be ignored See Foster v Arcata, supra.

B. The following facts are also undisputed:

1. Nowhere in any legislative history, or in the 1978 report of Congressional hearings or testimony, or any contemporaneous writing, is there any mention of the concept that the PDA was intended to cover prescription contraceptives simply because an employer's benefit plan covers "routine well baby care, routine physical exams, routine eye and hearing exams, and office calls and lab services for cancer screenings." See plaintiff's dep. Ex. 10, p 25. This is true even though prescription contraceptives had been in common use since the late 1960s. The legislative history does reflect detailed consideration of the following, however· disabilities related to pregnancy, miscarriage, abortion, or childbirth, and recovery therefrom; loss of seniority due to absence from work for childbirth; refusal to hire/termination of pregnant women or women who had an abortion; mandatory leave for pregnant women; reinstatement rights for women who gave birth; credit for accrued retirement while on leave due to birth; costs per week of providing coverage as demanded by PDA, and numerous other details.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622 8484
4400 TWO UNION SQUARE
601 UNION STREET SEATTLE WASHINGTON 98101 2352

Senators Reid and Snowe began introducing their Equity in Prescription and Contraception Coverage Act in 1997. Cappio Decl. at Exhibit 4 (S375). Federal Health Plans – the largest employer-sponsored health insurance plan in the country – were not required to cover prescription contraceptives until three years ago Id., at S376.

It is undisputed that Bartell's separate health care and prescription benefit plans *exclude* coverage for the broad category of *family planning*. i e, *in vitro* fertilization, sterilization, artificial insemination, embryo transfer, fertility drugs, treatment for sexual dysfunction or impotence, and contraceptive drugs and devices for both employees and their dependents. That is, Bartell's benefit plans do not cover *any* medical treatment for either male or female employees, or their dependents, enabling or preventing pregnancy

Plaintiff admits she has not been denied a job, not demoted, not denied a promotion, and has not lost her job because Bartell's prescription plan does not cover prescription contraceptives. There is no evidence to the contrary for any other employee Nothing in plaintiff's motion would help female employees obtain or retain any job.

There is no evidence that any female employee of Bartell did not obtain prescription contraceptives when she wanted them, or that she became pregnant because contraceptives were not covered by Bartell's self-funded prescription drug plan [1]

III. ISSUES

Plaintiff's final brief makes it clear that her focus is not on employment discrimination, but rather an attempt to use this court to mandate that insurance policies cover prescription contraceptives – this is a policy decision more appropriately addressed by Congress. Throughout plaintiff's brief she refers to the alleged disparate impact on "women" versus "men" of pregnancy, having children, purchasing contraceptives, etc. – not whether there is a disparate impact on female employees compared to male employees by the benefit plan excluding

[1] Plaintiff's expert cites some studies that hypothesize that some women *may* not get contraceptives because of lack of insurance coverage, but this is simply speculation.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET SEATTLE WASHINGTON 98101 2352

prescription contraceptives from its coverage Nothing in any of the materials plaintiff presents demonstrates a concern about employment discrimination. Rather, the concern is about all women's health

Issues the court should consider include

1 Whether the condition of nonpregnancy is a medical condition related to pregnancy and child birth

2. Whether an employer's fringe benefit plan that excludes coverage of all types of treatment or action to enable or prevent conception violates the PDA because one subset of that exclusion concerns only women.

3 Whether an employer's prescription benefit policy that excludes coverage of prescription contraceptives for both its female employees *and* the female dependents of its male employees violates the PDA

4. Whether an employer's health care plan that covers preventive treatment for diseases and disorders but not healthful conditions violates the PDA because it does not cover treatment that prevents pregnancy or conception.

IV. DISCUSSION

A. The PDA pertains to medical conditions related to *pregnancy* and *childbirth*, not to every condition related to female reproduction.

The 1978 Pregnancy Discrimination Act ("PDA") prohibits discrimination on the basis of "pregnancy, childbirth, or related medical conditions " It is important to note that the act refers to *pregnancy and childbirth*, and not to any condition related to women's ability to reproduce. A close examination of plaintiff's argument, however, demonstrates that she really is seeking coverage for conditions broadly related to female reproduction, and not based on the condition of pregnancy or childbirth.

It undisputed that prescription contraceptives are a pre-pregnancy treatment, rather than treatment for a pregnancy or child birth, or post-pregnancy, or post-childbirth. If, as

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622 8484
4400 TWO UNION SQUARE
601 UNION STREET SEATTLE WASHINGTON 98101-2352

plaintiff argues, remaining nonpregnant should be treated the same under the PDA as being pregnant because only women can be pregnant, then it would logically follow that anything related to female reproduction would be covered as a "related medical condition" under the PDA because, in the reproductive arena, only women get pregnant

For example, under plaintiff's interpretation of the statute, being infertile would be a "related medical condition" because it keeps a woman from becoming pregnant Thus, if that were true, an employer's benefit package that excludes coverage of *both* male and female infertility treatment would still be discriminatory on the basis of sex because only females can get pregnant excluding coverage of female infertility treatments would *per se* violate the PDA if the employer provides any health coverage at all that might use prescription drug care, surgery, screening, etc That this is an accurate extension of plaintiff's argument can be seen by the statements in her second brief· plaintiffs argue that Saks v. Franklin Covey, 117 F. Supp 2d 318 (S D N Y 2000), correctly held that infertility was a "related medical condition" under the PDA, but incorrectly held that an employer's benefits plan that excluded infertility treatments for both males and females was nondiscriminatory. *Plaintiff's Reply memo at 8, n 6* But this position has been rejected by other courts besides Saks. See Krause v. Iowa Methodist Med. Center, 95 F 3d 674 (8th Cir. 1996) (infertility is not a medical condition related to pregnancy and is not covered by the PDA).

The PDA pertains to pregnancy, child birth, and conditions resulting therefrom, not to any pre-pregnancy conditions, including the condition of nonpregnancy. If Congress had intended to cover anything other than pregnancy, child birth, and the medical conditions directly resulting from pregnancy or childbirth, it would have so indicated in the statute or, at the very least, in its discussion of the bill.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622 8484
4400 TWO UNION SQUARE
601 UNION STREET SEATTLE WASHINGTON 98101-2352

B. There is *no* evidence that Congress intended the PDA to cover prescription contraceptives.

Despite citing numerous Congressional statements that detailed many areas of concern discussed by Congress in passage of the PDA, plaintiff has not cited a single contemporary statement that even suggests Congress intended the prohibition on pregnancy and childbirth discrimination to also include prescription contraceptives to keep a woman in the state of being nonpregnant. To the contrary, all the contemporary discussions of the fringe benefits section of the PDA dealt with coverage for conditions arising *directly* from pregnancy and childbirth, i e , post-conception.

Even the legislative sources cited by plaintiff strongly indicate that Congress did *not* consider the PDA to cover prescription contraceptives: Senators Reid and Snowe began introducing legislation in 1997 that would mandate the coverage of contraceptives in employer provided insurance plans If Title VII and the PDA covered prescription contraceptives, there would be no need now to legislatively mandate such coverage Indeed, the federal government did not even require its own comprehensive employee benefits plans to cover prescription contraceptives until Congress voluntarily added such coverage three years ago Likewise, where coverage has been mandated at the state level, it has been through legislation See page 23, footnote 13, in Bartell's brief on cross-motion (4/13/01) for a list of related state legislation

C. Bartell's benefit plans treat all employees the same with regard to FAMILY PLANNING.

Plaintiff muddies the issues in this case by mischaracterizing Bartell's benefits plans: they do not just exclude prescription contraceptives, but for *family planning* they exclude the entire range of related drugs and treatments, regardless of whether used by men or women, or whether by an employee or a dependent.

It is undisputed that Bartell's benefit plans are consistent in excluding coverage for *family planning*, to include *in vitro* fertilization, sterilization, artificial insemination, embryo transfer, fertility drugs, sexual dysfunction, impotence, and contraceptive drugs and devices. See

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622 8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE WASHINGTON 98101 2352

Exs. 7 and 10 to Erickson Dep They do not cover any pre-conception condition for *any* of Bartell's employees *or* their dependents. That is, no employee or dependent – male or female – has any coverage for any disease, disorder, condition, etc., related to any pre-pregnancy condition, or to enable or stop conception.

In Newport News, supra, the Supreme Court reviewed an employer's plan that treated female employees differently than it treated the female dependents of male employees, and held that such a difference violated the PDA. Logically, then, when a benefit plan treats all employees and their dependents the same, it does not violate the PDA. The Saks court clearly recognized this

> [A]s long as both men and women receive the same benefits and are subject to the same exclusions under an employer's insurance policy, the policy does not discriminate on the basis of sex. Under Franklin Covey's Plan, both men and women are covered for certain types of infertility treatments (examples), and neither men nor women may receive benefits for other types of infertility treatment (surgical impregnation). *It is no answer to say that the excluded treatments can only be performed on women, because male employees can claim infertility-related benefits for treatments performed on their wives*--and are, conversely, precluded from obtaining benefits for surgical impregnation of their wives *Thus, both males and females receive the same "compensation, terms, conditions [and] privileges of employment" under the Covey Plan, as required under 42 U S C § 2000e-2(a)(1)* All Franklin Covey employees, male and female, who see surgical impregnation as the answer to their infertility problems have to foot the bill
>
> If female employees of Franklin Covey, like Saks, were denied benefits for surgical impregnation, but those benefits were made available to male employees whose wives were surgically impregnated, Title VII would come into play It does not on the facts before me Plaintiff's claim of discrimination based on sex is dismissed.

Saks v. Franklin Covey, 117 F. Supp. 318, 328 (S.D N.Y 2000) (emphasis added)

Plaintiff seeks to carve out a small subset of family planning involving pre-pregnancy treatments that apply only to women, and then claim that Bartell discriminates because it does not cover this small subset If, as plaintiff argues, the prevention of pregnancy must be covered under the PDA when an employer's health plan covers any preventive treatment, why does plaintiff only seek relief as to "reversible" contraception and not to permanent means

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET SEATTLE WASHINGTON 98101-2352

of preventing pregnancy? The answer must be because Bartell's plan excludes all permanent means of pregnancy used by both men and women, and thus plaintiff's only hope of showing "discrimination" is to narrow the focus.

Even this argument does not avail plaintiff, however, because the exclusion of prescription contraceptives under Bartell's plan is equally applicable to both female employees and to the female dependents of male employees As a result, both male and female employees are treated equally under the benefits plan See Newport News and Saks

D. Bartell's benefit plans do not cover preventive treatment of conditions "similar" to nonpregnancy.

Plaintiff argues that because Bartell provides coverage for any kind of "preventive treatment" it must also cover the narrow subset of prescription contraceptives that prevent pregnancy But plaintiff ignores that Bartell's preventive benefits plans cover prevention only of diseases or body malfunctions The "preventive benefits" pertain to medical concerns such as cancer screening, exams to check for hearing loss, diminished sight, etc. Even then, not every treatment that prevents a disease or body malfunction is covered.

No one today would argue that pregnancy is a disease or body malfunction. To the contrary, one purpose of the PDA was to attack such stereotypical notions about pregnancy.[2] To get around this, plaintiff argues that because the statute contains the phrase "other persons not so affected but similar in their *ability* or inability *to work*" (emphasis added), then there is no intent in the PDA that these "other related medical conditions" be a disability or disorder to be covered. This argument makes no sense.

First, the reason for including the phrase "ability to work" was to combat the stereotype that pregnant women are unable to work for no other reason than that they were

[2] In her most recent brief, plaintiff asserts that the Bartell plan covers drugs used to prevent benign prostatic hypertrophy, as if that condition somehow equates to preventing pregnancy. But benign prostatic hypertrophy is a glandular condition that causes the urinary tract to malfunction – not anything like pregnancy or child birth – and the health care coverage includes several medical conditions suffered only by women.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622 8484
4400 TWO UNION SQUARE
601 UNION STREET SEATTLE WASHINGTON 98101 2352

pregnant. Such notions were hurdles to obtaining or retaining employment for women, and it is clear that the PDA intended to eliminate such hurdles. If a pregnant woman is just as capable of performing a particular job as man, then it is discrimination to deny her the job merely because she is pregnant That is the reason for including "ability . to work" in the statute.

Second, as plaintiff concedes, the PDA does not require that an employer provide coverage of "pregnancy, child birth, or related medical conditions" *unless* it provides coverage for similar conditions not related to pregnancy or child birth Bartell's plan provides preventive care for diseases and disorders, not for healthful conditions Bartell's plan does not, for example, cover prescriptions for preventive cosmetic purposes, such as Rogaine to help to prevent hair loss (Baldness, while possibly not as socially acceptable as a full head of hair, is not a disease or disorder, but is as equally healthful a condition as having hair) Because the preventive coverage in Bartell's plan applies only to diseases and disorders, even under plaintiff's theory there is no discrimination for not providing contraceptives

E. Johnson Controls is not applicable in this case.

Plaintiff relies on Johnson Controls, but as noted in defendant's moving brief, Johnson Controls does not apply. It concerned a work rule that purportedly sought to protect unborn children by excluding all women from certain jobs that had lead exposure, thus treating all women employees as potentially pregnant The policy did not, however, exclude men from these jobs despite the evidence of potential danger to a child fathered by a man exposed to lead Thus, the policy explicitly differentiated between female and male employees in their eligibility for jobs, creating a hurdle to employment for women and forcing them into the very choice that the PDA sought to eliminate having a child or having a job.

Johnson Controls did not involve fringe benefit plans. It attacked a hurdle to employment caused by the employer's assumption that every woman employee would be pregnant – thus, it concerned discrimination on assumption of actual pregnancy. By contrast, there is no issue in our case about hurdles to employment. Further, the benefit plan offered by

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE WASHINGTON 98101 2352

Bartell treats all of its employees the same because it applies to the employees and their dependents, and no employee or dependent has coverage for *family planning* of any kind.

F. Newport News is applicable and demonstrates that Bartell's benefit plan is nondiscriminatory.

Like this case, Newport News concerns benefits, not jobs. The Court held that the provision of greater pregnancy benefits coverage for female employees than spouses of male employees was discrimination in violation the PDA See also the discussion of Saks, above Conversely, in our case the lack of prescription benefits applies equally to female employees and male employees (i e , through their wives).

G. EEOC decision not entitled to deference.

Plaintiff argues in support of her original motion that this Court should defer to the EEOC's December 2000 decision. Bartell disagrees, as noted earlier, and also refers the court to a recent Ninth Circuit decision rejecting an argument that the court should defer to the EEOC:

> The EEOC's current interpretation of the Act . is entitled to no deference Rather than resolving an ambiguity or exercising delegated authority, it conflicts with the plain language of this statute . .

Weyer v Twentieth Century Fox Film Corp , 198 F 3d 1104, 1117 (2000) (Judge Kleinfeld, affirming Judge Dwyer, W D. Wash). Bartell contends plaintiff's position herein conflicts with the plain language of the PDA

H. Both disparate treatment and disparate impact claims should be dismissed.

As clearly demonstrated above, Bartell's prescription benefit plan on its face is not discriminatory, and summary judgment in favor of defendant should be granted.

Equally clearly, there can be no factual dispute that there is a disparate impact as to women, as plaintiff argues, because the plan applies equally in its benefits (or lack of benefits) to both male and female employees *and* their dependents. There is no set of facts or evidence or testimony that alter the fact that the Bartell's plans equally impact male and female employees because they include dependents.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622 8484
4400 TWO UNION SQUARE
601 UNION STREET SEATTLE WASHINGTON 98101-2352

V. CONCLUSIONS

Plaintiff's claims fail as a matter of law For the foregoing reasons, The Bartell Drug Company asks the court to grant its motion and dismiss both of plaintiff's claims with prejudice

DATED this 10th day of May, 2001.

MILLER NASH LLP

James R. Dickens

James R Dickens
WSB No 4610
Susan K Stahlfeld
WSB No. 22003

Attorneys for Defendant

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622 8484
4400 TWO UNION SQUARE
601 UNION STREET SEATTLE WASHINGTON 98101 2352

I hereby certify that I served the foregoing DEFENDANT'S REPLY ON CROSS-MOTION FOR SUMMARY JUDGMENT on:

(VIA MESSENGER)
Roberta N. Riley
Planned Parenthood of Western Washington
2001 East Madison
Seattle, WA 98122-2959

Attorneys for Plaintiff

(VIA MESSENGER)
Lynn Lincoln Sarko
T David Copley
Gretchen Freeman Cappio
Keller Rohrback, L L.P
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052

Attorneys for Plaintiff

(VIA U.S. MAIL)
Eve C. Gartner
Donna Lee
Planned Parenthood Federation of America
801 Seventh Avenue
New York, NY 10019

Attorneys for Plaintiff

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DATED this 10th day of May, 2001

James R. Dickens
Of Attorneys for Defendant

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MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101 2352